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EXAMINER	
WATTS, JENNA A	

ART UNIT	PAPER NUMBER
1781	

NOTIFICATION DATE	DELIVERY MODE
12/22/2010	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PATDOCTC@fr.com

Office Action Summary	Application No.	Applicant(s)	
	10/550,936	SARNEEL ET AL.	
	Examiner	Art Unit	
	Jenna A. Watts	1781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *01 November 2010*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *10-13 and 19-21* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *10-13 and 19-21* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *28 September 2005* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☒ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 11/1/2010 has been entered.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 11 and 12 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Regarding amended Claim 11, there does not appear to be support in the originally filed specification for the limitation of “said

completed mix is a layer on, under and/or around the meat, fish, poultry, seafood, rice, potato, dairy products, fruits and/or vegetables" in light of Paragraph 121 of Applicant's Pre-Grant Publication. This is a new matter rejection.

5. Claim 12 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

6. Regarding Claim 12, the amendment to Claim 11 renders Claim 12 unclear, because amended Claim 11 claims that the completed mix is a layer under or around the claimed foods and Claim 12 claims that the layer is one of the claimed components. The layer can not both be a completed mix and one of the claimed foods, therefore, the claim is unclear.

Claim Rejections - 35 USC § 102 / Claim Rejections - 35 USC § 103

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

9. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

10. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

11. Claim 19 is rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Henckel (GB 1,294,426), previously cited by Applicant.

12. Henckel teaches a spread or filling in cakes and for decorations (Page 1, Column 1, lines 10-12), therefore used in sweet tasting products, comprising a dry mix (Page 1, Column 1, lines 10-12 and 35-40), and Henckel teaches that the dry cream powder comprises 65-85% by weight of the cream powder of a pulverent compound and 15-35% by weight of the cream powder of fat, wherein the pulverent component itself

comprises: 25-99% by weight of the pulverent is protein containing product, 1-5% by weight of the pulverent is swellable starch, and up to 70% by weight of the pulverent is sugar (Page 1, Column 1, lines 43-47 and Column 2, lines 50-55). The percentages of the components by weight of the pulverent component are equivalent to the following percentages of the components by weight of the dry cream powder as follows:

13. Henckel teaches 16.25-84.15% protein by weight of the dry cream powder, which overlaps with the claimed amount of protein, or would have been obvious to one of ordinary skill in the art at the time that the invention was made, because Henkel teaches the protein component can be 16-20% of the dry cream powder, which meets Applicants claim.

14. Henkel teaches 0.65-4.25% starch by weight of the dry cream powder and 0-70% sugar by weight of the dry cream powder, which can be added together to form a carbohydrate portion in an amount of between 0.65-63.75% by weight of the dry cream powder, which overlaps with the claimed amount of carbohydrate, or would have been obvious to one of ordinary skill in the art at the time that the invention was made, because Henkel teaches the total carbohydrate component can be 25-63.75% of the dry cream powder, which meets Applicants claim.

15. Lastly, Henckel teaches 15-35% by weight of the cream powder of fat, which encompasses the claimed amount of fat in the spread or filling.

Claim Rejections - 35 USC § 103

16. Claims 10-13 and 19-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fazzina et al. (U.S. Patent No. 3,852,501) in view of Suderman (U.S. Patent No. 4,588,600), further in view of Evans et al. (U.S. Patent No. 4,208,442), and further in view of Kettlitz (U.S. Patent No. 6,235,894), all previously made of record.

17. Regarding Claims 10, 19, 20 and 21, Fazzina teaches a food composition wherein said food composition comprises meat (Column 1, lines 60-65) and also teaches a dry mix (Column 1, lines 61-63) which provides an edible food coating that will form a continuous, crisp, fat fried-like coating when applied to a wide variety of foodstuffs (Column 1, lines 40-43 and Column 3, lines 15-17). Fazzina teaches that the mix is applied or spread onto foods such as meat and subsequently baked (Column 1, lines 9-10 and line 63), thus the mix is also deemed a spread in baked savory products.

18. Fazzina further teaches that the dry mix comprises corn starch hydrolyzate in an amount of 15-35% (Column 2, lines 13-15 and 36-37), farinaceous material, which is usually a flour such as wheat, corn, etc. in an amount of 8-35% (Column 2, lines 22-23 and 37-38), modified starch, which can be partially gelatinized, in an amount of 5-18%, and shortening/fat in an amount of 10-50% (Column 2, lines 60-61 and Column 3, lines 1-2), all by weight of the final dry coating mixture. Regarding the limitation of 25-65 wt % carbohydrates in Claim 19, Fazzina teaches that the combined amount of carbohydrates can be between 28-88 wt %, wherein 28-65 wt % meets the claimed

limitation. Regarding the limitation of 15-28 wt % fat, Fazzina's teaching of between 10-50 wt % of fat/shortening meets the claimed limitation.

19. Since Fazzina teaches that wheat flour can be present, it would be reasonably expected that some amount of gluten would be present in the dry mix, however, Fazzina does not specifically teach that the proteins are vital wheat gluten present in an amount of 10-20% or 12-25% by weight.

20. Suderman teaches a dry edible food composition for use in imparting a baked, coated comestible the taste, texture and appearance of a fried coated comestible (Column 3, lines 58-60), which comprises a blend of flours including corn flour (Column 4, lines 40-43) and a heat coaguable protein film former such as vital wheat gluten (Column 4, lines 45-46), employed in an amount of about 0-20%, based on the weight of the dry mix (Column 6, lines 14-15), wherein the amount of vital wheat gluten taught by Suderman meets the claimed ranges of Applicant for the amount of protein/vital wheat gluten or gluten present. Suderman teaches that the vital wheat gluten is the principle structure-building ingredient of the present invention (Column 6, lines 13-14) and further teaches that it is the intention in the present invention to use the flours more as bulking agents, and to rely on controlled amount of structure-building proteins such as vital wheat gluten, to obtain an engineered structure (Column 5, lines 30-34). Suderman further teaches that the vital wheat gluten in the mix contributes to producing a coating that forms a substantially continuous film or envelope expanded in some irregular manner, which further closely simulates the appearance of a fried product (Column 4, lines 60-65 and 18-20).

21. Therefore, it would have been obvious to one of ordinary skill in the art at the time that the invention was made, for the dry mix of Fazzina to further include vital wheat gluten in range of 0-20%, as taught by Suderman, because Suderman teaches that the combination of flour and vital wheat gluten in the dry mix contribute to produce a coating that forms a substantially continuous film or envelope that closely resembles a fried food product. One of ordinary skill in the art would have been motivated to add gluten in an amount of 10-20% or 12-25% by weight to the dry mix in order to produce a food product with a continuous outer coating and the taste, texture and appearance of a fried-food product.

22. Fazzina in view of Suderman teach the use of a modified starch that can be partially gelatinized (see Fazzina, Column 2, lines 50-51), but do not specifically teach the use of starch n-octenyl succinate.

23. Evans teaches a dry coating composition that is used to produce a baked coated comestible with a coating having a crisp texture and taste, a uniform coloration and appearance and good adhesion to the comestible surface as well as the taste, texture and appearance of a fried coated comestible (Column 1, lines 34-39 and 45-46). Evans further teaches adding a binding agent to the dry coating (Column 13-14) that is a starch modified using 1-octenyl succinic anhydride, and further teaches that this modified starch provides optimum emulsive and film-forming properties which are suitable in the instant invention (Column 3, lines 30-34). Starch 1-octenyl succinic anhydride is deemed synonymous with n-octenyl succinate in light of the Kettlitz reference that teaches that n–octenyl succinic anhydride is also called n-OSA and

equates it with n-octenyl succinated starches (see Kettlitz, Column 2, lines 57-58 and Column 4, line 20) and Applicant refers to n-octenyl succinate as n-OSA (See instant application, Page 9, lines 10). Furthermore 1-OSA is deemed chemically synonymous with n-OSA.

24. Therefore, it would have been obvious to one of ordinary skill in the art at the time that the invention was made, for the dry mix of Fazzina in view of Suderman to have used n-octenyl succinate as the modified starch, as taught by Evans, because Evans teaches that n-octenyl succinate provides optimum emulsive and film-forming properties which are suitable to produce a food product with an outer coating that has good adhesion to the food product and resembles a fried food product. One of ordinary skill in the art would have been motivated to such n-octenyl succinate in order to ensure that the coating was uniform and adhered to the food product, thereby creating a food product that resembles a fat-fried product that is desirable to consumers.

25. Fazzina in view of Suderman and Evans are taken as cited above but do not specifically teach the use of stabilized starch n-octenyl succinate.

26. Kettlitz teaches the preparation of a heat stable high viscosity starch obtained by reacting starch or chemically modified starches with activated chlorine under alkaline conditions (Column 2, lines 48-50) and further teaches that high viscosity starches have a tendency to burst during heating which leads to a drastic viscosity breakdown and in order to overcome such undesirable viscosity breakdown, starches may be stabilized (Column 1, lines 25-28). Kettlitz further teaches that the high viscosity stabilized starches are particularly suitable in many different preparations, for example, in the

preparation of meat products and convenience foods that need to have a high viscosity and smooth texture after heating (Column 1, lines 47-49 and 51-52).

27. Therefore, it would have been obvious to one of ordinary skill in the art at the time that the invention was made, for the starch n-octenyl succinate as taught by Fazzina in view of Suderman and Evans to have been stabilized starch n-octenyl succinate, because Kettlitz teaches that such stabilized starches are particularly suitable for the preparation of meat products and convenience foods where a high viscosity and smooth texture after heating are desirable. One of ordinary skill in the art would have been motivated to use a stabilized starch in the preparation of baked and breaded meat products in order to ensure that the resulting breading/coating has a smooth and uniform texture and that the starch remains stable and viscous during heating to allow it to act as a binding agent in the coating.

28. Regarding the claimed parameters of the dry mix in Claim 10, since Fazzina in view of Suderman, Evans and Kettlitz teach the dry mix composition of Claim 10, it would be reasonably expected that the dry mix would possess the claimed parameters of freeze-thaw stability, baking stability and a stable viscosity under alkaline, acidic and neutral pH conditions, absent any evidence to the contrary, because since Fazzina in view of Suderman, Evans and Kettlitz teach the claimed composition comprising the same components, the composition will react or co-act in the same manner as claimed by Applicant, and therefore, the properties of these components will necessarily be present. Furthermore, it is noted that the component and its properties are inseparable.

Therefore, if the components are present, their properties would also be necessarily present. See *In re: Papesch* and *In re: Antonie* as cited in MPEP 2141.02 V.

29. Furthermore, the specific parameters of freeze-thaw stability, baking stability and viscosity that are claimed in Claim 10 are not met by any reference here because Applicant has chosen to describe his product with physical characteristics that are beyond measurement by this Office and as a practical matter, the Patent Office is not equipped to manufacture products and then obtain prior art products and make physical comparisons therewith. See In re Brown, 59 CCPA 1036, 459 F.2d 531,173 USPQ 685 (1972) at 59 CCPA 1041. Since Fazzina in view of Suderman, Evans and Kettlitz teach the claimed components in the claimed percentages, it would be expected, absent any evidence to the contrary, that the composition would meet the claimed limitations. Thus the previously mentioned limitations of Claim 10 are shown by the above mentioned references.

30. Furthermore, it has been found that "[T]he PTO can require an applicant to prove that the prior art products do not necessarily or inherently possess the characteristics of his [or her] claimed product. Whether the rejection is based on inherency' under 35 U.S.C. 102, on prima facie obviousness' under 35 U.S.C. 103, jointly or alternatively, the burden of proof is the same...[footnote omitted]." The burden of proof is similar to that required with respect to product-by-process claims. In re Fitzgerald, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1980) (quoting In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977)). MPEP 2112.V.

31. Regarding Claims 10, 13 and 21, Fazzina in view Suderman, Evans and Kettlitz are taken as cited above in the rejection of Claim 10 for the limitations of the dry mix and the claimed parameters of the dry mix and teach a food composition comprising meat and a completed mix which can then be baked, where the completed mix is also a spread, because Fazzina in view of Suderman and Evans teach a dry flowable mix which is applied to a wetted foodstuff (see Fazzina, Column 1, lines 61-63), wherein the foodstuff is wetted with milk and then coated with the dry mix (see Fazzina, Column 4, lines 20-21). Fazzina in view of Suderman and Evans further teach that, during cooking, the shortening melts and enrobes all parts of the coating so as to spread out any material that may remain as a dry powder (see Fazzina, Column 2, lines 60-63). Therefore, Fazzina in view of Suderman, Evans and Kettlitz teach the importance of maintaining sufficient moisture around the food product during cooking to ensure that there is no dry powder remaining on the wetted food product.

32. It is also noted that Suderman teaches a dry mix that is combined with water and liquid oil to form a batter and such a combination may result in a liquid oil/water matrix in which the dry particles are fairly uniformly dispersed (See Suderman, Column 4, lines 8-10). Suderman teaches that the completed mix or batter is spread or applied onto a food product prior to baking (Column 3, lines 44-45). Suderman further teaches that normally this would be likely to result, on baking, in a uniform appearance and structure (See Suderman, Column 4, lines 10-11).

33. Therefore, it can be seen from the art, that it is known to either combine the dry mix with a foodstuff that has been wetted, such as in the case of Fazzina, or to combine

a liquid and a dry mix, thereby forming Applicant's claimed completed mix, and apply it to a food product, such as in the case of Suderman, both methods resulting in a uniformly coated food product that has a coating resembling a fat-fried food product. Therefore, it is known in the food industry to use such completed mixes in order to provide coatings or spreads on food products such as meats, and therefore, it would have been obvious to one of ordinary skill in the art at the time that the invention was made, to use either method in order to prepare coated food products.

34. The combination of the milk and dry mix applied to the foodstuff, as taught by Fazzina, can be seen as a completed mix and can also be seen as a spread because in effect, the milk and dry mix form a coating and are thus spread or applied onto the food product prior to baking. Furthermore, Suderman teaches a completed mix that is also deemed a spread because the completed mix or batter is spread or applied onto a food product prior to baking (see Suderman, Column 3, lines 44-45).

35. Regarding amended Claim 10, Fazzina in view of Suderman, Evans and Kettlitz teach the claimed completed mix and teach combining the completed mix with a food product such as meat and baking the food product and completed mix (see above rejection of Claim 10).

36. Regarding amended Claims 10 and 21, it is noted that the claim limitation regarding the completed mix "can" be baked, fried, etc. or "can" be consumed as a spread, into a casing, and "can" be baked, fried or cooked, all are optional limitations and since the above references teach the clamed completed mix comprising the

claimed components, one of ordinary skill in the art would have reasonably expected that the completed mix taught would be capable of the claimed functions.

37. Regarding Claims 11 and 12, Fazzina in view of Suderman, Evans and Kettlitz are taken as cited above and teach a snack or savory filled product, because Fazzina in view of Suderman, Evans and Kettlitz teach a food product such as meat that is coated with a mixture of a liquid and a dry mix, which makes up the completed mix (see Fazzina and Suderman in the rejection of Claim 10). Therefore, the meat is deemed a filling of the coated food product (see Fazzina, Column 61-64). Fazzina in view of Suderman, Evans and Kettlitz further teach that many foods, such as poultry, meat, fish and vegetables are breaded with a light coating of flour or breadcrumbs which on frying in oil develops into a characteristic crispy, brown-colored coating (see Fazzina, Column 1, lines 11-13). Suderman teaches that it is known to coat various comestibles, such as meat, with a combination of batter and breading mixes wherein the breading is relied upon to give a crispness and appearance somewhat characteristic of a fried or deep-fat fried comestible (see Suderman, Column 1, line 31 and 37-39). Therefore, the layer of breading is on and/or around the completed mix and the meat, the breading deemed synonymous with bread or bread crumbs.

38. Therefore, it would have been obvious to one of ordinary skill in the art at the time that the invention was made, for the food product of Fazzina in view of Suderman, Evans and Kettlitz to have comprised a combination of batter and a breading or bread-crumb layer, because Suderman teaches that a combination of a batter a breading are relied upon to give a crispness and an appearance reminiscent of a fried food product.

One of ordinary skill in the art would have been motivated by Suderman to have included both a batter or mix along with a breading layer in order to prepare healthier baked food products for consumers that are characteristic of fried foods without the frying stage.

39. Regarding Claim 19, Fazzina in view of Suderman, Evans and Kettlitz are taken as cited above in the rejection of Claim 10 and teach a dry mix that comprises 10-50% weight % fat (see Fazzina Column 2, lines 60-61 and Column 3, lines 1-2), thus a fat % of 15-28 is also encompassed by Fazzina. Fazzina in view of Suderman, Evans and Kettlitz further teach proteins in the range of 0-20 weight % of vital wheat gluten (see Suderman in the rejection of Claim 10, Column 4, lines 45-46 and Column 6, lines 14-15), thus a protein % of 10-20 is also encompassed by Suderman. Fazzina in view of Suderman, Evans and Kettlitz also teach carbohydrates in the claimed range (see Fazzina in the rejection of Claim 10 and Column 2, lines 13-15 and 36-37). The dry mix can also be seen as a spread in baked savory products because Fazzina in view of Suderman, Evans and Kettlitz teach that the mix is applied or spread onto foods such as meat and subsequently baked (see Fazzina, Column 1, lines 9-10 and line 63).

40. Claims 10-13 and 19-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gambino et al. (U.S. Patent Application Number 2002/0039612) in view of McGlynn et al. (U.S. Patent Number 6,322,829), further in view of Barry et al. (U.S. Patent Number 4,919,947) and further in view of Kettlitz et al. (U.S. Patent Number 6,235,894), previously cited by Examiner.

41. Regarding Claims 10 and 13, Gambino teaches a food composition which comprises meat, dairy products, vegetables etc. because Gambino teaches a filled waffle comprising a filling that may comprises savory type fillings such as cheese, tomato, meat, etc. (Paragraphs 14 and 20), wherein the filling comprises water and other dry components such as 0-10% protein which can be vital wheat gluten, therefore reading on 10% gluten (Page 3, Table 1 and Paragraph 36), 0-40% sweeteners or carbohydrates which can be mannitol (Table 1 and Paragraph 22), wherein mannitol reads on starch hydrolysates because mannitol is a polyol or a hydrogenated starch hydrolysate in light of Applicant's specification (Page 8, Paragraph 4). Gambinos' teaching of 0-40% mannitol includes the range claimed by Applicant for the amount of starch hydrolysates. Gambino also teaches 0-8% starch, wherein the starch can be chemically modified starch and other kinds of starch (Table 1 and Paragraph 25). Gambino also teaches 0-8% fat (Table 1). It would be reasonably expected that where the filling comprises cheese, the cheese would also contribute some amount of fat to the filling.

42. Gambino does not specifically teach gluten in an amount from 12-25%, the claimed amount of flour, stabilized starch n-octenyl succinate, or 15-28% or 17-25% by weight fat.

43. McGlynn teaches a savory filling for food products comprising cheese (Column 1, lines 10-12 and Column 2, lines 50-55) and teaches that the savory filling can be incorporated into a wide variety of food products, including pies, pastries, and snacks or it may be used as a sauce or spread (Column 7, lines 35-40). McGlynn teaches that the

fat component of the fat and water emulsion may be provided entirely by the cheese portion of the filling, or in a preferred embodiment additional fat or oil is added to provide the desired melting profile and viscosity (Column 3, lines 25-28) and teaches that the fat is present in an amount effective to form a stable emulsion that provides the filling with the desired amount of controlled melting properties and if fat is added to the filling, it is preferably present in an amount ranging between 12-25% by weight (Column 3, lines 45-50), which overlaps with the ranges claimed by Applicant. McGlynn teaches that the total fat of the filling, from the cheese and any added sources should be sufficient to give the desired consistency and melting profile and can range from about 10-60% by weight (Column 3, lines 50-55). McGlynn also teaches that the filling comprises a protein component which provides a structure or matrix to the filling which may enhance the emulsion stability, thereby minimizing oil or water migration from the filling and also contributes to the desired viscosity profile and melt characteristics and if an added protein is used, it is preferably used in amounts which bring the total protein content to between 2-20% or 5-12% by weight (Column 5, lines 35-45).

44. Therefore, it would have been obvious to one of ordinary skill in the art at the time that the invention was made, for the dry mix of Gambino to have the claimed amount of gluten and fat, because McGlynn teaches that both protein and fat contribute to the viscosity and melt characteristics of the filling and stabilize the emulsion of the filling and that the claimed amounts of both protein and fat are preferred for the mentioned purposes. One of ordinary skill in the art would have been motivated to optimize the amounts of both the gluten and fat in order to prepare a filling that has the

desired viscosity, melt characteristics and that forms a stable emulsion for use in bakery products.

45. Gambino in view of McGlynn do not specifically teach the claimed amount of flour in the filling.

46. Barry teaches a filling which is particularly suited for use in filled products which can be described as having an outer shell of cooked dough with a central cavity that contains a filling (Column 1, lines 20-25) and teaches that it is known to prepare fillings comprising cheese powder together with a solids extender dispersed in a vegetable shortening base and that it is desirable in such filling to have a high solids content, particularly a high content of the extender, in order to reduce costs and to reduce caloric and fat intake (Column 1, lines 55-60). Barry teaches a filling comprising from about 10 to about 40% solids extender, shortening and other flavors and teaches that the solids extender can be selected from the known solids extenders which include maltodextrin, pregelatinized starch and other modified starches, and milled flour and the solids extender serves to adjust texture, supply body and replace more expensive solid flavoring materials (Column 4, lines 5-10).

47. In addition, Gambino teaches that the sweeteners, humectants, modified starches and gums trap moisture in the filling which reduces and manages the formation of water crystals when the filled waffle is frozen by forming a viscous mass with the water and further the viscous mass prohibits moisture form migrating into the casing material (Paragraph 30). McGlynn further teaches that the viscosity of the filling is a result effective variable because too much viscosity causes difficulties in processing but

the filling should be viscous enough to provide the desired mouthfeel and organoleptic qualities without having the filling separate out at eating temperatures (Column 6, lines 13-18).

48. Therefore, the prior art teaches that flour is a known solids extender that serves to adjust texture and body of the filling and also reduces the cost of the filling and the art also teaches that the viscosity of the filling is important for various organoleptic and practical purposes. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention was made, to have added flour to the filling of Gambino in view of McGlynn and to have optimized its amount because the prior art teaches that flour is a commonly used extender in fillings for baked dough products that adjusts texture and supplies body and would thus affect the viscosity of the filling and that the viscosity has to be balanced so that processing is not hindered while ensuring a desirable taste, mouthfeel and stability of the product. It would have been within the skill of one of ordinary skill in the art to add and adjust the amount of flour to the filling in order to provide the optimum mouthfeel and viscosity of the filling when used in conjunction with baked dough products.

49. Gambino in view of McGlynn and Barry teach the use of chemically modified starches in the filling, but do not specifically teach the claimed stabilized starch n-octenyl succinate.

50. Kettlitz teaches the preparation of a heat stable high viscosity starch obtained by reacting starch or chemically modified starches with activated chlorine under alkaline conditions, such as n-octenyl succinilated starches (Column 2, lines 48-50). Kettlitz

teaches that highly swollen (viscous) cooking stable starches are used in the preparation of bakery creams and fillings and convenience foods need to have a high viscosity and smooth texture after heating and stabilized high viscosity starches are particularly suited for the mentioned applications (Column 1, lines 46-54). Kettlitz teaches that high viscosity starches have a tendency to burst during heating which leads to a drastic viscosity breakdown and in order to overcome such undesirable viscosity breakdown, starches may be stabilized (Column 1, lines 25-28).

51. Therefore, it would have been obvious to one of ordinary skill in the art at the time that the invention was made, for the chemically modified starch as taught by Gambino in view of McGlynn and Barry to have been stabilized starch n-octenyl succinate, because Kettlitz teaches that such stabilized starches are particularly suitable for the preparation of bakery creams and fillings where a high viscosity and smooth texture after heating are desirable. One of ordinary skill in the art would have been motivated to use a stabilized starch in the preparation of a filling for use in baked products in order to ensure that the resulting filling has the desired stability and viscosity following heating and/or re-heating of the product prior to consumption.

52. Since Gambino in view of McGlynn, Barry and Kettlitz teach water and the other components that make up the claimed dry mix to form the filling, they are deemed to teach a completed mix and filling/spread as per Claims 10 and 13 that is combined with the food composition as claimed. Furthermore, Gambino teaches that the filled waffle is frozen after preparation (see Gambino, Paragraph 9).

53. Regarding the claimed parameters of the dry mix in Claims 10 and 13, since Gambino in view of McGlynn, Barry and Kettlitz teach the dry mix compositions of Claims 10 and 13, it would be reasonably expected that the dry mix would possess the claimed parameters of freeze-thaw stability, baking stability and a stable viscosity under alkaline, acidic and neutral pH conditions, absent any evidence to the contrary, because since Gambino in view of McGlynn, Barry and Kettlitz teach the claimed composition comprising the same components, the composition will react or co-act in the same manner as claimed by Applicant, and therefore, the properties of these components will necessarily be present. Furthermore, it is noted that the component and its properties are inseparable. Therefore, if the components are present, their properties would also be necessarily present. See *In re: Papesch* and *In re: Antonie* as cited in MPEP 2141.02 V.

54. Furthermore, the specific parameters of freeze-thaw stability, baking stability and viscosity that are claimed in Claims 10 and 13 are not met by any reference here because Applicant has chosen to describe his product with physical characteristics that are beyond measurement by this Office and as a practical matter, the Patent Office is not equipped to manufacture products and then obtain prior art products and make physical comparisons therewith. See In re Brown, 59 CCPA 1036, 459 F.2d 531,173 USPQ 685 (1972) at 59 CCPA 1041. Since Gambino in view of McGlynn, Barry and Kettlitz teach the claimed components in the claimed percentages, it would be expected, absent any evidence to the contrary, that the composition would meet the

claimed limitations. Thus the previously mentioned limitations of Claim 10 are shown by the above mentioned references.

55. Furthermore, it has been found that "[T]he PTO can require an applicant to prove that the prior art products do not necessarily or inherently possess the characteristics of his [or her] claimed product. Whether the rejection is based on inherency' under 35 U.S.C. 102, on prima facie obviousness' under 35 U.S.C. 103, jointly or alternatively, the burden of proof is the same...[footnote omitted]." The burden of proof is similar to that required with respect to product-by-process claims. In re Fitzgerald, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1980) (quoting In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977)). MPEP 2112.V.

56. Regarding Claims 11 and 12, Gambino in view of McGlynn, Barry and Kettlitz teach that the food composition is a savory filled product, such as a filled waffle, wherein the food composition comprises the completed mix (see rejection of Claim 10 above), and where the completed mix is a layer under or on or around meat, cheese or vegetables because such components can be included in the filling as well, and where the layer reads on pastry, bread or cake batter, because Gambino in view of McGlynn, Barry and Kettlitz teach that the filling is inside a waffle casing made from a batter which reads on pastry, bread or cake batter (see Gambino in rejection of Claim 10).

57. Regarding Claims 19 and 20, Gambino in view of McGlynn, Barry and Kettlitz are taken as cited above in the rejection of Claims 10 and 13 and are deemed to teach the spread or filling in baked savory products comprising the generic dry mix of Claim 19 as well as the more specific dry mix of Claim 20.

58. Regarding Claim 21, Gambino in view of McGlynn, Barry and Kettlitz are taken as cited above in the rejection of Claims 10 and 13 for the limitation of the food composition comprising the claimed components and the completed mix, comprising the dry mix having the claimed parameters and a liquid such as water, and wherein the completed mix can be consumed into a casing and can be baked or cooked, as taught by the references above.

Response to Arguments

59. The prior art rejections set forth in the office action mailed on 7/14/2010 have been withdrawn in light of Applicant's amendments.

60. However, the prior art previously used has been applied again to reject Applicant's pending claims. Additionally, new rejections of the pending claims have been set forth for the reasons as set forth above.

61. Applicant's arguments filed on 11/1/2010 regarding the rejections previously set forth have been fully considered but they are not persuasive.

62. Regarding the amendments to Claim 11, as previously set forth in the Advisory Action mailed 9/22/2010, the amendment to Claim 11 introduces 112 1st new matter and a 112 2nd rejection of Claim 12, because Claim 11 now claims that the completed mix is a layer around or on the claimed food and Claim 12 claims that the layer is one of pastry, crumble, bread, biscuits, etc. Therefore, this is very unclear and Applicant's amendment to Claim 11 did not clarify the situation.

63. Regarding Applicant's arguments relating to the previous rejections set forth and the obviousness of the composition of the dry or completed mix, the Examiner respectfully disagrees and refers Applicant to the arguments presented in the Final Rejection. As previously stated, the prior art provides clear motivation to add gluten and the claimed stabilized starch into the composition of Fazzina, and therefore, such additions would have been obvious to one of ordinary skill in the art at the time that the invention was made. In regards to Applicant's comments regarding the Examiner simplifying the pending claims and the prior art, it is again noted that the dry mix as claimed has been rejected by the prior art of record. Furthermore, regarding the claimed parameters of the dry mix, as previously stated, the USPTO is not capable of performing laboratory experiments that would be able to compare those parameters of the prior art and those of Applicant's claimed invention, therefore, given the fact that the prior art as cited teaches the claimed dry or completed mix comprising the claimed components, one of ordinary skill would have reasonably expected that the dry or completed mix as taught by the prior art would be capable of functioning as claimed for the reasons as set forth in the above rejection.

64. Furthermore, one of ordinary skill in the food art would not have expected that using components in mixes of the sort described in the prior art for their art recognized functions in art recognized amounts would have involved an inventive step and therefore their use would have been obvious for the reasons previously stated.

Conclusion

65. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jenna A. Watts whose telephone number is (571) 270-7368. The examiner can normally be reached on Monday-Friday 9am-5:00pm.

66. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

67. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/C. SAYALA/
Primary Examiner, Art Unit 1781

/Jenna A. Watts/
Examiner, Art Unit 1781
December 17, 2010